

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EVELYN L. "PEACH" MURPHY,
Administratrix of the Estate of
Andrew John Murphy,

Appellant/Plaintiff Below,

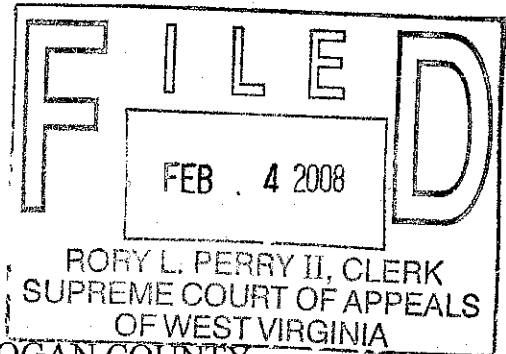
v.

APPEAL NO.: 33811

S. W. JACK DRILLING COMPANY;
KENNETH GREATHOUSE; and
RODNEY PAXTON.

Appellees/ Defendants Below.

FROM THE CIRCUIT COURT OF LOGAN COUNTY



APPELLANT'S BRIEF

**To the Honorable Justices of the
Supreme Court of Appeals
of West Virginia**

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III STANDARD OF REVIEW AND JURISDICTION

This Court reviews Orders Granting Summary Judgment *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Original jurisdiction is vested in this Court by virtue of *West Virginia Constitution Art. 8 § 3* and *West Virginia Code § 51-1-3*. The Order appealed from is a Final Order with respect to the Appellee, S. W. Jack Drilling Company, dismissing this Defendant from the underlying action as a Defendant. *See* attached Order. The underlying action has been Stayed by the lower court pending this appeal. This Petition was timely filed as the lower court's order granting Summary Judgment was entered on March 21, 2007, and the Petition to this Court was filed on or about April 20, 2007. The Appellant's Brief has been timely filed pursuant to Order entered by this Court on January 10, 2008.

IV PROCEEDING BELOW

The lower court entered summary judgment in favor of Defendant, S. W. Jack Drilling Company upon causes of action for deliberate intent filed pursuant to *West Virginia Code § 23-4-2* for the wrongful death of Andrew John Murphy. Summary Judgment was entered, not based upon a failure by the Plaintiff to satisfy an element of deliberate intent as set forth in *West Virginia Code § 23-4-2*; but rather, based upon the lower court's interpretation of this Court's holding in *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006) (Davis C.J., Maynard, J., dissenting).

V STATEMENT OF FACTS

Andrew John Murphy (A.J. Murphy) began working for S. W. Jack Drilling Company (S.W. Jack) on or about September 25, 2005. While working for S.W. Jack on November 2, 2005, A.J. Murphy was ordered to beat down foam on a mud pit with a tree branch. The foam built up as a result of the use of soap in the drilling process. This soap is pumped down the drilling hole to lubricate the drill, and to aid in the extraction of drill cuttings.

The mud pit was approximately 80 feet long by 20 feet wide and eleven (11) to fourteen (14) feet deep. It had been raining the night before, and the ground around the mud pit was muddy. When A.J. Murphy went in close proximity of the mudpit to beat down the foam with a tree branch, he was not supplied with any safety equipment of any kind that would have, or could have, saved his life should he fall or slip into the mudpit.

The mudpit around which A.J. Murphy was working was lined to prevent contaminants from the drilling process, most particularly heavy metals, from entering the environment and contaminating ground water. While working around the mudpit, and beating down the foam on the mudpit as directed by his direct supervisor, A.J. Murphy noticed that a portion of this liner had fallen off the bank of the mudpit. A.J. Murphy then attempted to pull this liner up out of the pit. While attempting to pull this liner up, A.J. Murphy fell into the mudpit and

disappeared beneath the foam and water in the mudpit. Attempts were made to rescue A.J. Murphy, but failed. A.J. Murphy died in that mudpit shortly after 9:00 a.m. November 2, 2005. A.J. Murphy was nineteen (19) years old at the time of his death, and died intestate.

Following A.J. Murphy's death, Larry Jett, a friend of the Murphy family, was appointed the Administrator of A.J. Murphy's Estate. Unfortunately, Mr. Jett subsequently died in an ATV related accident and Evelyn L. "Peach" Murphy, A.J. Murphy's mother, was appointed the Administratrix of A.J. Murphy's Estate on December 12, 2006. The only surviving heirs of the Estate are Andrew John Murphy's mother, Evelyn L. "Peach" Murphy, and his sister, Heather Murphy.¹

After A.J. Murphy's death, Evelyn L. "Peach" Murphy filed for death benefits through the West Virginia Workers' Compensation system that at that time was being administered by Brickstreet Mutual Insurance Company. By way of letter dated August, 2006, Ms. Murphy was informed that Brickstreet had denied her request for death benefits based upon a determination by a Brickstreet insurance adjuster that Ms. Murphy was not a dependent of A.J. Murphy at the time of his death, and further based upon *West Virginia Code* § 23-4-10(d) and *Alexander v. Compensation Comm'r*, 113 W.Va. 223, 167 S.E. 589 (1933).

The Defendant, S.W. Jack Drilling Company, filed its Motion for Summary Judgment, not claiming that it was not at fault for A.J. Murphy's death, but rather

¹ At one point in litigation, it was suspected that Andrew John Murphy may have fathered a child before his death. After DNA testing, this possibility has been conclusively ruled out.

claiming that no one that had survived A.J. Murphy may recover under the deliberate intent laws of the State of West Virginia. The lower court, in entering Summary Judgment, relied primarily upon this Court's holding in *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006). For the reasons set forth below, the Plaintiff Petitioned this Court requesting this Court to overturn the lower court's order and remand this matter for further proceedings below. This Court, by Order dated January 10, 2008, granted the Petition, and the Appellants now files Appellant's Brief.

VI

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT'S INTERPRETATION AND APPLICATION OF W. VA. CODE § 23-4-2(c) IS ERRONEOUS
 - A THE CIRCUIT COURT IMPROPERLY OMITTED THE WORD "EMPLOYEE" IN INTERPRETING W. VA. CODE § 23-4-2(c)
 - B THE CIRCUIT COURT IMPROPERLY OMITTED THE WORDS "AS IF THE WORKERS COMPENSATION ACT HAD NOT BEEN ENACTED" IN INTERPRETING W. VA. CODE § 23-4-2(C)
2. THE CIRCUIT COURT'S RULING, BASED UPON THE COURT'S DECISION IN *SAVILLA* DECISION, IN AS MUCH AS *SAVILLA* IS FACTUALLY DISTINGUISHABLE FROM THE CASE AT BAR
3. THE CIRCUIT COURT'S RELIANCE ON THE ADMINISTRATIVE PROCEDURES SET FORTH IN THE WORKERS' COMPENSATION ACT IN RULING THAT EVELYN L "PEACH" MURPHY WAS NOT A DEPENDENT OF ANDREW JOHN MURPHY WAS ERRONEOUS AND PRESENTED A TRIABLE JURY QUESTION
4. THE LOWER COURT'S RULING VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION AND THE PUBLIC POLICY OF THE STATE OF WEST VIRGINIA

VII DISCUSSION OF LAW

1. **THE LOWER COURT'S INTERPRETATION AND APPLICATION OF W. VA. CODE § 23-4-2(c) IS ERRONEOUS**

The lower court's interpretation and application of W. Va. Code § 23-4-2(c) is erroneous. First, the Circuit Court improperly omitted the word "employee" when interpreting W. Va. Code § 23-4-2(c). Second, the lower court improperly omitted the words "as if this chapter had not been enacted" from W. Va. Code § 23-4-2(c). Each is addressed separately below.

A. **THE LOWER COURT IMPROPERLY OMITTED THE WORD "EMPLOYEE" WHEN INTERPRETING W. VA. CODE § 23-4-2(C)**

The Estate of Andrew John Murphy (A.J. Murphy) may recover the benefits of a deliberate intent action on behalf of the deceased employee, Andrew John Murphy. *West Virginia Code* § 23-4-2(c) expressly states that a deliberate intent cause of action for the death of an employee may be brought by "the employee, the widow, widower, child or dependent of the employee." Stated differently, for a deliberate intent wrongful death cause of action, there exists four categories of plaintiffs that may recover the proceeds under the statute: employee, widow/widower, child or dependent.

The lower court, in relying on *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006), ruled that an "employee" may not recover for deliberate intent when the employee has died. With the sole exception of the

majority opinion in *Savilla*, there exists no other precedent that would prevent the Estate of A.J. Murphy from stepping into the shoes of A.J. Murphy to pursue a cause of action for deliberate intent wrongful death. In this regard, this Court has implicitly recognized that "employee" means the estate of the employee. See *Michael v. Marion County Bd. of Educ.*, 198 W.Va. 523, 482 S.E.2d 140 (1996) (spouse of decedent brought deliberate intent cause of action against employer individually and as representative of decedent's estate); *Cline v. Jumacris Min. Co.*, 177 W.Va. 589, 355 S.E.2d 378 (1987).

This Court has previously allowed an Estate of a deceased worker to recover Workers' Compensation benefits when the deceased employee did not have a surviving spouse, child or dependent. See *Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000). In allowing the estate of a deceased employee to recover Workers' Compensation benefits, this Court stated:

This case was not filed in the circuit court by the spouse, children, or other dependents of the decedent. In fact, Mr. Zelenka, the decedent, did not have a spouse, child or any other dependents. This case was prosecuted by the apparent non-dependent executrix of the decedent's estate.

See *Zelenka*, 208 W.Va. at 249, 539 S.E.2d at 756.

It appears as though the *Savilla* decision did not address the potential of an Estate stepping into the shoes of the employee for a deliberate intent action, and further excised from W. Va. Code § 23-4-2(c) the word "employee." Further, and in reliance on the majority opinion on *Savilla*, the lower court failed to consider

that an Estate could step into the shoes of the employee to pursue a deliberate intent cause of action.

Therefore, and in keeping with the decision in *Zelenka*, this Court should allow the Estate of Andrew John Murphy to step into the shoes of the deceased employee, and allow the Estate to maintain a cause of action for deliberate intent wrongful death against S. W. Jack Drilling Company and to recover for the deliberate actions of the Appellee, S. W. Jack Drilling Company in causing the death of Andrew John Murphy.

**B. THE LOWER COURT IMPROPERLY OMITTED THE WORDS
“AS IF THIS CHAPTER HAD NOT BEEN ENACTED.”**

“In a deliberate intention action, if the employee establishes that the employer acted with conscious, subjective deliberation, intentionally exposing the employee to a specific unsafe working condition, the employer loses the workers' compensation immunity and may be subjected to a cause of action for damages as if the Workers' Compensation Act ‘had not been enacted.’” *Marcus v. Holley*, 217 W.Va. 508, 618 S.E.2d 517 (2005); *West Virginia Code* § 23-4-2(c) (2003) (Supp.2004).

“When deliberate intention is proven, in a workers' compensation case, an employer loses his immunity from civil liability for work-related injuries to employees provided by the Workers' Compensation Act.” Syl Pt. 2, *Mayles v. Shoney's, Inc.*, 185 W. Va. 88, 405 S.E.2d 15 (1990), *Deskins v. S.W. Jack Drilling Company*, 215 W. Va. 525, 600 S.E. 2d 237 (2004).

In passing *West Virginia Code* §23-4-2(c), the West Virginia legislature clearly stated that the employer shall lose all immunity if it is proven that the employer acted with deliberate intent to cause an injury to an employee. Had the legislature wished to allow the Defendant some protection under the Workers' Compensation scheme should it be proven that the employer acted with deliberate intent, the legislature could have included that language. The legislature chose not to take this approach, and instead passed an Act that would completely strip an employer of the immunity provided by the Workers' Compensation Act should it be proven that an employer acted with deliberate intent to cause harm to injure an employee.

"In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). Applying this principle to *West Virginia Code* § 23-4-2(c), to allow the Workers' Compensation Act to limit those persons who may recover for a deliberate intent action would be to read "as if this chapter had not been enacted" out of the Act itself. Therefore, in interpreting this Code provision, this phrase must be given meaning, and the Act should not be applied to limit those persons who may recover damages for a deliberate intent cause of action.

This issue has been addressed in the case *Weis v. Allen*, 147 Or. 670, 35 P.2d 479 (1934). In the *Weis* opinion, the Supreme Court of Oregon undertook interpreting its Workers' Compensation law which was very similar to the statute

at issue in the instant action.² In considering whether an injured employee would be able to recover punitive damages, which such damages were expressly forbidden under the Oregon Workers' Compensation Act, the Court stated:

The wording of the statute, however, is that if the injury results from the deliberate intention of the employer, the employee shall have cause of action against his employer, "as if this act had not been passed," for the recovery of damages in a sum over and above that to which he is entitled as an award under the act. The defendant does not dispute that at common law it would have been proper to submit to the jury the question of punitive damages, in the light of the facts in this case. The section of the act in question does not limit the amount of recovery on the part of the injured employee, but creates an additional fund for the payment of a part of the damages for injuries sustained.

Weis v. Allen, 147 Or. At 684, 35 P.2d at 483.

As with the decision in *Weis*, *West Virginia Code* § 23-4-2(c) must be read such that the provisions Workers' Compensation Act has no application to a deliberate intent action once it is proven "that the employer acted with conscious, subjective deliberation, intentionally exposing the employee to a specific unsafe working condition." Therefore, should the Plaintiff prevail in proving that S.W. Jack Drilling Company acted with deliberate intent to cause the death of A.J.

² "Section 49-1828, Oregon Code 1930, provides in part as follows: 'If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman * * * shall have the privilege to take, under this act, and also have cause for, action against the employer, as if this act had not been passed, for damages over the amount payable hereunder.'" *Weis v. Allen*, 147 Or. At 672, 35 P.2d at 479.

Murphy, the protections of the Workers' Compensation Act are cast aside and Evelyn L. "Peach" Murphy may recover "as if this [the Workers' Compensation Act] had not been enacted" under the West Virginia wrongful death statute, *West Virginia Code* § 55-7-6(a). Moreover, the issue of whether the employer consciously, subjectively and deliberately formed the intention to cause the death of Andrew John Murphy is a question of fact for the jury to consider. *See Travis v. Alcon Laboratories, Inc.*, 202 W.Va. 369, 504 S.E.2d 419 (1998), *Mooney v. Eastern Associated Coal Corp.*, 174 W.Va. 350, 352, 326 S.E.2d 427, 429 (1984).

To simply read out of *West Virginia Code* § 23-4-2(c) the phrase that states "as if this chapter had not been enacted" creates an even larger problem when attempting to read this Code Section in conjunction with *West Virginia Code* § 55-7-6(a). *West Virginia Code* § 55-7-6(a) states: "Every such action shall be brought by and in the name of the personal representative of such deceased person who has been duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, and the amount recovered in every such action shall be recovered by said personal representative and be distributed in accordance herewith."³

³ *West Virginia Code* § 55-7-6(b) states: In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section. If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance

Under *West Virginia Code* § 55-7-6, the Estate representative, in the present case A.J. Murphy's mother and administratrix Evelyn L. "Peach" Murphy, may pursue a cause of action for wrongful death. But according to the lower court's ruling, the only person(s) who may recover are a surviving spouse, child or dependent.

Initially, it should be noted that this theory violates Rule 17 of the *West Virginia Rules of Civil Procedure* because the lower court will be faced with the situation where the Estate representative has no interest in the case, but is the only party that can prosecute the case. See *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006) (Davis C.J., Maynard, J., dissenting).⁴

The lower court read "as if this chapter had not been enacted" out of *West Virginia Code* § 23-4-2(c), and ruled that the only persons whom may recover for a deliberate intent wrongful death cause of action are spouses, children or dependents of the deceased employee. Conversely, *West Virginia Code* § 55-7-6 requires that the case be prosecuted by the Administratrix of the Estate, whom under the Workers' Compensation Act could potentially be a party without an interest in the outcome of the case.

with the laws of descent and distribution as set forth in chapter forty-two of this code. If the jury renders only a general verdict on damages and does not provide for the distribution thereof, the court shall distribute the damages in accordance with the provisions of this subsection.

⁴ Rule 17 of the *West Virginia Rules of Civil Procedure* states, in part: "Every action shall be prosecuted in the name of the real party in interest."

Certainly the legislature did not pass these two Acts with such differing and contrasting outcomes, and no way to amicably reconcile the provisions of these Acts with each other. Moreover, the legislature would not have passed the Workers' Compensation Act with the understanding that "as if this chapter had not been enacted" must be read out of the Act by the various Courts of this State. The only logical way to read these two statutes in concert is to give weight to *West Virginia Code* § 23-4-2(c) and phrase "as if this chapter had not been enacted." Then, the Estate of those employees killed on the job due to the deliberate intent of an employer will be able to stand in the shoes of the employee as intended by the legislature in passing *West Virginia Code* § 55-7-6, which is the only possible intention of inserting phrase "as if this chapter had not been enacted" in *West Virginia Code* § 23-4-2(c).

Also, the Administratrix of the Estate will be a party of interest in the case pursuant to the wrongful death statute, and Rule 17 of the *West Virginia Rules of Civil Procedure* will not be violated. Therefore, and based upon the above stated, the lower court's ruling should be overturned and this case remanded to continue to trial.

2. THE SAVILLA DECISION IS FACTUALLY DISTINGUISHABLE FROM THE CASE AT BAR

It should be noted that in its Response to the Petition filed with this Court, the Appellee, S. W. Jack Drilling Company, attempted to minimize the pertinent facts of this case. Contrary to this position, the Appellant asserts the facts of this case, and the way in which Andrew John Murphy lost his life, are essential to this Court's determination in this matter. As such, the facts of this case are distinguishable from the facts in the *Savilla* decision.

The facts of the *Savilla* case began with the death of Linda Kannaird when she drowned after falling out of a rescue boat. Ms. Kannaird was being rescued from her place of employment, a Speedway store, after the store had flooded. Shortly after her death, Ms. Kannaird's daughter, Eugenia Moschgat, qualified as the Administratrix of the Estate and filed a lawsuit against Speedway for deliberate intent in connection with her mother's death.

After a court battle, Moschgat was removed as Administratrix of the Estate and replaced by Diana Savilla, one of Linda Kannaird's siblings, who as a group were claiming to be beneficiaries of the Estate. Moschgat had been estranged from her deceased mother for some time and the relationship between Moschgat and her mother's siblings also exhibited some hostility.

After being replaced as Administratrix of the Estate, Moschgat entered into a settlement agreement with Speedway separately from Savilla, and outside of the

then pending lawsuit. Speedway then filed a Motion to Dismiss based upon the fact that a settlement had been reached with Moschgat.

Speedway relied upon *West Virginia Code* § 23-4-2(c) claiming that Savilla was not one of the persons that can recover for a deliberate intent cause of action. *West Virginia Code* § 23-4-2(c) limits those that can recover under a deliberate intent cause of action to “the employee, the widow, widower, child or dependent of the employee.” *West Virginia Code* § 23-4-2(c)⁵. Speedway further argued that it had satisfied the deliberate intent action through the settlement with Moschgat, who Speedway claimed was the only person who could recover for a deliberate intent cause of action. This Court agreed with Speedway, and held that “pursuant to *West Virginia Code*, 23-4-2(c) [2005] and *West Virginia Code*, 55-7-6 [1992], the persons who can potentially recover ‘deliberate intention’ damages from a decedents’ employer are the persons specified in W. Va. Code, 23-4-2 [2005]: the employee’s widow, widower, child or dependent of the employee.” *See Savilla*, 219 W.Va. 758, 639 S.E.2d 850 (2006).

Upon remanding the case, it was determined that no person was financially dependent upon Kannaird. This Court further stated:

Under W. Va. Code 55-7-6, our wrongful death statute, the personal representative has a fiduciary obligation to the beneficiaries of the deceased because the personal representative is merely a nominal party and any recovery passes to the beneficiaries designated

⁵ It should be emphasized that the *Savilla* decision completely omitted the word “employee” from *West Virginia Code* § 23-4-2(c) as a class of person that may recover.

in the wrongful death statute and not to the decedent's estate.

See *Savilla v. Speedway Super America, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006) citing Syl. Pt. 4, *McClure v. McClure*, 184 W. Va. 649, 403 S.E. 2d 197 (1991). Therefore, it appears as though Savilla majority primarily relied upon the fact that Moschgat, the surviving child of the deceased, had settled and resolved her claims against Speedway and had joined Speedway's motion to dismiss the action.

In the present case there has been no settlement reached by any party with S. W. Jack Drilling Company. Moreover, the surviving heirs of Andrew John Murphy, as set forth by West Virginia's laws of intestacy, are united in their efforts in this law suit and no waiver has occurred that would indicate that the heirs of the Estate have been satisfied. Therefore, and because the facts of Savilla are distinguishable from the facts of the case at bar, the lower court's ruling should be overturned and this case remanded to continue to trial.

3 THE LOWER COURT'S RELIANCE ON THE ADMINISTRATIVE PROCEDURES SET FORTH IN THE WORKERS' COMPENSATION ACT IN RULING THAT EVELYN L. "PEACH" MURPHY WAS NOT A DEPENDENT OF ANDREW JOHN MURPHY WAS ERRONEOUS AND PRESENTED A TRIABLE JURY QUESTION

The lower Court relied upon *West Virginia Code 23-5-1(b)* in holding that a determination made by a Brickstreet Mutual Insurance adjuster that Evelyn L. "Peach" Murphy was not a dependent for A.J. Murphy was binding upon the

lower court, and that entry of Summary Judgment was appropriate.⁶ Stated differently, the lower court held that a decision issued by a Brickstreet insurance adjuster was binding in circuit court.

Because *West Virginia Code* §23-4-2(c) specifically removes the Plaintiff from the administrative confines of the Workers' Compensation Act, *West Virginia Code* § 23-5-1(b) has no application to a deliberate intent action. Moreover, *West Virginia Code* § 23-5-1(b) is only applicable to claims submitted under the administrative process of filing a claim for Workers' Compensation benefits, and is only binding upon "the commission, the successor to the commission, other private insurance carriers and self-insured employers" and the jurisdiction of these entities. *West Virginia Code* § 23-5-1(b) does not affect the

⁶ *West Virginia Code* 23-5-1(b) states: Except with regard to interlocutory matters and those matters set forth in subsection (d) of this section, upon making any decision, upon making or refusing to make any award or upon making any modification or change with respect to former findings or orders, as provided by section sixteen, article four of this chapter, the commission, the successor to the commission, other private insurance carriers and self-insured employers shall give notice, in writing, to the employer, employee, claimant or dependant as the case may be, of its action. The notice shall state the time allowed for filing an objection to the finding. The action of the commission, the successor to the commission, other private insurance carriers and self-insured employers is final unless the employer, employee, claimant or dependant shall, within thirty days after the receipt of the notice, object in writing, to the finding. Unless an objection is filed within the thirty-day period, the finding or action is final. This time limitation is a condition of the right to litigate the finding or action and hence jurisdictional. Any objection shall be filed with the office of judges with a copy served upon the commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, and other parties in accordance with the procedures set forth in sections eight and nine of this article. In all instances where a private carrier, self-insured employer or a third-party administrator has made claims decisions as authorized in this chapter, they shall provide claimants notice of all claims decisions as provided by rules for self-administration promulgated by the board of managers and shall be bound by each requirement imposed upon the commission by this article.

jurisdiction of the lower Court which is expressly granted to the lower court by *West Virginia Code* § 23-4-2.

Further on this issue, this Court has stated: "The State Compensation Commissioner has no power or jurisdiction to vacate, set aside or modify a final order made by him, except in the instances specifically provided by statute." Syl. Pt. 1, *Burr v. State Comp. Comm'r*, 148 W.Va. 17, 132 S.E.2d 636 (1963); *Cottrell v. State Comp. Comm'r*, 115 S.E.2d 153, 145 W.Va. 336 (1960). There was no final Order issued by the State Compensation Commissioner with respect to the issue of whether Evelyn L. "Peach" Murphy was a dependent of A.J. Murphy. The letter the lower court relied upon was authored by a Brickstreet insurance adjuster, and was not a final order issued by the State Compensation Commissioner. More importantly *West Virginia Code* § 23-5-1(b) only sets forth the jurisdictional power of "the commission, the successor to the commission, other private insurance carriers and self-insured employers" in the administration of Workers' Compensation claims. *West Virginia Code* § 23-5-1(b) does not change, limit or affect the jurisdictional power of the lower court, which is expressly granted it by *West Virginia Code* § 23-4-2.⁷

⁷ See *Jarrell v. State Workmens' Comp. Comm'r*, 163 S.E.2d 798, 152 W.Va. 418 (1963) (decision to deny claim preclusive as to second claim filed by claimant); *Burr v. State Comp. Comm'r*, 148 W.Va. 17, 132 S.E.2d 636 (1963) (Order of State Compensation Commissioner is final and conclusive when entered only as to facts considered by the Commissioner making the finding).

Because the restrictions placed upon the administrative claims process of the Workers' Compensation system has no application to a deliberate intent action, the lower court's determination that it was bound by the Brickstreet adjuster's letter was erroneous. Moreover, because *West Virginia Code* § 23-5-1(b) does not limit the jurisdiction of the lower Court, the lower court's entry of Summary Judgment must be overturned and this case remanded.

The lower court further relied upon this Court's decision in *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998) in deciding that the Brickstreet insurance adjuster's determination that Evelyn L. "Peach" Murphy was not a dependent of A.J. Murphy was binding in circuit court. However, this ruling is erroneous.

Frazier v. Hrko stands for the narrow proposition that when the Commissioner of Workers Compensation determines that an employer is in default of the workers' compensation system, the matter is final and may not be re-litigated or collaterally attacked.

Our ruling today is limited to employer default rulings by the Commissioner. We decline to consider the impact on trial court proceedings of rulings by the Commissioner concerning other issues (such as whether a claimant was an employee, or whether an injury occurred in the course of employment or was otherwise compensable).

FN 18, *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998).

The *Frazier v. Hrko* decision, by its own language, only addresses the narrow situation set forth in *West Virginia Code* § 23-2-5(d)⁸ when an employer is found to be in default of the workers' compensation system by the Commissioner of Workers' Compensation. This case does not address the situation here where an adjuster for workers compensation made an administrative decision denying benefits to a surviving parent. Therefore, the *Frazier v. Hrko* decision has no applicability to the case at bar.

In the present case, the Commissioner of Workers' Compensation never addressed the merits of the application for fatal dependents' benefits completed by Evelyn L. "Peach" Murphy. Ms. Murphy was denied death benefits by a Traumatic Claims Coordinator [adjuster] for Brickstreet insurance who does not even appear to be associated with the Commissioner of Workers' Compensation's Office.

On this issue, this Court has stated:

[T]hat for preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered

⁸ *W. Va. Code* 23-2-5(d) states: Failure by the employer, who is required to subscribe to the fund and who fails to resolve the delinquency within the prescribed period, shall place the account in default and shall deprive the default employer of the benefits and protection afforded by this chapter, including section six of this article, and the employer is liable as provided in section eight of this article. The default employer's liability under these sections is retroactive to midnight of the last day of the month following the end of the reporting period for which the delinquency occurs. The commission shall notify the default employer of the method by which the employer may be reinstated with the fund. The commission shall also notify the employees of the employer by written notice as hereinafter provided in this section.

pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court

State v. Miller, 194 W. Va. 3, 459 W.E.2d 114 (1995) citing *Vest v. Board of Educ. Of the County of Nicholas*, 193 W. Va. 222, 455 S.E.2d 781; *Liller v. West Virginia Human Rights Comm'n*, 180 W. Va. 433, 440 376 S.E.2d 639, 646 (1988).⁹ Moreover, other decisions issued by this Court stand for the proposition that decisions by an administrative agency are not binding as res judicata or collateral estoppel in Circuit Court.¹⁰

Taken as a whole, the decision rendered by an adjuster for Brickstreet Insurance Company to determine that Evelyn L. "Peach" Murphy was not dependent upon her adult son cannot be binding upon the lower court. The adjuster did not issue the decision after any adjudicatory procedure and the procedure that was used, a cursory review of an application and a review of Andrew John Murphy's wages for the years immediately preceding his death, are not the procedures the lower court would employ. The adjuster did not conduct any witness interviews, did not present any witnesses to any adjudicatory body, and was not subject to cross-examination. Therefore, the decision by the adjuster

⁹ It has even been held that the deceased need not be living with the dependent parent at the time of death for the dependent parent to be determined a partial dependent. See *Hudson v. State Compensation Comm'r*, 121 W. Va. 461, 5 S.E.2d 108 (1939).

¹⁰ See *Page v. Columbia Natural Resources*, 198 W. Va. 378, 480 S.E.2d 817 (1996) (administrative proceeding had no preclusive effect where proceeding was conducted without delay and formality involved in court proceedings).

for Workers' Compensation to deny Evelyn L. "Peach" Murphy death benefits is not binding upon the lower court.

The question of whether Evelyn L. "Peach" Murphy was a dependent of Andrew John Murphy can only be answered by a jury. "The question of dependency * * * under Workmen's Compensation Law, is one of fact and not of law, to be determined by the evidence in each particular case." *Wills v. State Compensation Com'r*, 114 W.Va. 822, 174 S.E. 323 (1934) citing *Poccardi v. Commissioner*, 79 W. Va. 684, 91 S.E. 663.

While the question of whether Evelyn L. "Peach" Murphy was a dependent of Andrew John Murphy is a jury issue, there was ample evidence submitted to the lower court to allow this issue to survive a factually based motion for summary judgment. For Peach Murphy to be determined a dependent, she would have to be wholly or partially dependent upon A.J. Murphy's salary.¹¹ During the deposition of Evelyn L. "Peach" Murphy, the following colloquies took place:

Q. A.J. [Murphy] was how old at the time of --

¹¹ "Dependent", as used in this chapter, means a widow, widower, child under eighteen years of age, or under twenty-five years of age when a full-time student as provided in this section, invalid child or posthumous child, who, at the time of the injury causing death, is dependent, in whole or in part, for his or her support upon the earnings of the employee, stepchild under eighteen years of age, or under twenty-five years of age when a full-time student as provided in this section, child under eighteen years of age legally adopted prior to the injury causing death, or under twenty-five years of age when a full-time student as provided in this section, father, mother, grandfather or grandmother, who, at the time of the injury causing death, is dependent, in whole or in part, for his or her support upon the earnings of the employee; and invalid brother or sister wholly dependent for his or her support upon the earnings of the employee at the time of the injury causing death. West Virginia Code 23-4-10(d).

A. Nineteen

Q. The day of the incident was in November of 2005, correct

A. Yes.

Q. Where was A.J. living?

A. With me.

Q. Had he ever moved out of the house?

A. No.

See Deposition of Evelyn "Peach" Murphy, Pg. 11.

Q. When he [A.J. Murphy] was working for any of these businesses, did he keep the money that he made of did it go in like a family--

A. No. The checks came to the house. And the last conversation I had with him -- he told me to cash his check, keep him \$500, buy dog food and cat food and groceries and pay a bill. Then he wanted to take two bills a month to make his; like a phone bill and an electric bill to be his bills.

Q. He wasn't at S. W. Jack very long?

A. No, probably a month, six weeks.

Q. As far as the checks coming in, was that a customary distribution; keep 500 for me and then take the rest, or did that change?

A. That was the way it was. I mean, when he [A.J. Murphy] worked for Pizza Hut, he didn't make a lot of money, but what he had -- he would buy groceries or whatever we needed; horse feed. He was making pretty good money for -- at S. W. Jack, so he just wanted enough to get back to work; his gas and motel and stuff like that.

In *Wills v. State Compensation Com'r*, 114 W.Va. 822, 174 S.E. 323 (1934), the question presented to this Court was whether a widow who was receiving benefits from a deceased husband could also receive benefits for her deceased son, Ray Wills, upon whom she was dependent for support. The facts in *Wills* showed that, at the time of his death, the deceased son contributed a major portion of his paycheck (approximately \$20.00 to \$35.00 per month) to support his family. See *Wills*, 114 W. Va. at 822, 172 S.E. at 324. This Court determined that Mrs. Wills was entitled to death benefits for her son's death based upon this dependency. In so finding, this Court stated:

The fact that a widowed mother receives compensation from the workmen's compensation fund on account of the death of her husband does not deprive her of the right also to receive compensation as a partial dependent of an adult, unmarried son who lived in her home and regularly contributed to the family expenses both prior to and subsequent to the husband's death.

Syl. Pt. 5, *Wills v. State Compensation Com'r*, 114 W.Va. 822, 174 S.E. 323 (1934). Based upon this holding, should it be shown the Andrew John Murphy was an adult, unmarried son, who lived with his mother and regularly contributed to the family expenses, the lower Court has sufficient evidence to allow this issue to be presented to a jury.

It was proven during discovery conducted in the lower proceeding that A.J. Murphy was 19 years old at the time of his death. Also, it was proven that A.J. Murphy was unmarried and living full time with his mother at the time of his death. It was further shown that A.J. Murphy contributed to the family expenses,

both before and after he began working for S. W. Jack Drilling Company. Therefore, and based upon the *Wills* decision, sufficient facts were presented to the lower court to put this issue before a jury, and entry of Summary Judgment was improper. Therefore, and based upon the above stated, the lower court's ruling must be overturned and this case remanded.

4. THE LOWER COURT'S RULING VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES AND THE WEST VIRGINIA CONSTITUTION AND THE PUBLIC POLICY OF THE STATE OF WEST VIRGINIA

Should this Court uphold the lower court's entry of summary judgment, the result would be a legislative scheme that violates the equal protection rights of the heirs of the Estate of Andrew John Murphy. The only difference between Andrew John Murphy's death, and the death of some other person who was killed while on the job, was that Andrew John Murphy's life was taken from him at the time before he had established a family of his own.

A.J. Murphy lost his life due to an on the job incident, and should this Court uphold the lower court's order, his heirs could potentially be left without legal recourse against the entity responsible for his death, S. W. Jack Drilling Company. In this regard, should this Court uphold the lower court's order, it would have to omit "as if this act had not been enacted" from *West Virginia Code* §23-4-2(c) and would thereby extinguish the rights of the heirs of A.J. Murphy's Estate. Because *West Virginia Code* §23-4-2(c) would then violate the rights of

the heirs, this Code Section would be unconstitutional based upon equal protection grounds.

Under the rational basis test, a reviewing court should not overturn a statute on equal protection grounds unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court may only conclude that the law is irrational. *Marcus v. Holley*, 217 W.Va. 508, 618 S.E.2d 517, *citing*, U.S. Constitution Amend.14.; W. Va. Const. Art. 3, § 10. Legislative classifications, such as those involving economic rights and those not involving suspect classifications or constitutional rights, are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose. *Id.* Regardless of the level of scrutiny to be applied in this matter, the lower court's order clearly violates the equal protection rights of the heirs of the Estate of Andrew John Murphy.

In the present case, the beneficiaries of the Estate of Andrew John Murphy are not receiving the same benefits and protections as are the beneficiaries of a deceased person who has been wrongfully killed while not on the job, or who was killed on the job but after starting a family. There is no rational basis, or legitimate government purpose, for this differing treatment. Therefore, should this Court uphold the lower court's order that omitted the phrase "as if this chapter had not been enacted" from West *Virginia Code* §23-4-2(c), this Code Section would have to be determined to be unconstitutional based upon equal protection grounds.

“In this regard, [c]ourts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law.” *Morris v. Crown Equipment Corp.*, 219 W.Va. 347, 633 S.E.2d 292 (2006) quoting *Carvey v. State Bd. of Educ.*, 206 W.Va. 720, 727, 527 S.E.2d 831, 838 (1999).¹²

The only way to maintain the constitutionality of *West Virginia Code* §23-4-2(c) is to read with full force and effect the phrase “as if this chapter had not been enacted.” Under this statutory interpretation, *West Virginia Code* §23-4-2(c) can be given full meaning to all of its provisions and *West Virginia Code* § 55-7-6 would continue to control those persons who may receive the benefits of a deliberate intent wrongful death cause of action because *West Virginia Code* §23-4-2(c) would be inapplicable. To rule any other way would require that *West Virginia Code* §23-4-2(c) be found unconstitutional and in violation of the constitutional right to equal protection under the law.

The lower court’s order also violates the public policy of the State of West Virginia. Simply stated, the lower court’s order held that, because Andrew John

¹² Contrary to the holding in *Morris* and *Carvey*, the lower court, in reliance on this Court’s decision in *Savilla*, has construed *West Virginia Code* §23-4-2(c) in such a way as to make it contrary to the Constitutions of the United States and West Virginia.

Murphy died on the job, without a spouse, without a child and without a dependent, then no person may recover for the wrongful acts of the Defendant, no matter how egregious those acts may have been. In essence, what the lower court held is that because A. J. Murphy was too young to have started a family, or to have someone depend on him financially, then the Defendant had free reign to take whatever steps it desired with respect to A.J. Murphy's work environment, up to and including sending him to his death. The lower court's order in essence has granted all West Virginia employers complete immunity from deliberate intent wrongful death causes of action so long as the employee killed on the job did not have a spouse, a child or a dependent.

The public policy created by this legal holding would have horrific ramifications throughout the workforce of the State of West Virginia. An intelligent employer in a dangerous industry would be compelled, financially and legally, to only hire young men and women who were without spouses, children or dependents, then cast those employees in the most dangerous, unprotected working conditions imaginable. Then, as those employees began to die, for whatever reason, the company could simply hide behind *West Virginia Code* §23-4-2(c), and say that because the dead employee has no surviving spouse, child or dependent, no judgment could be had against the company. This is precisely what the Appellee, S. W. Jack Drilling Company has done in this case.

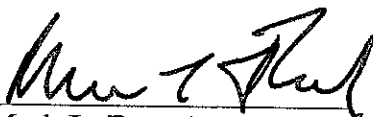
The lower court's order is against the clear public policy of the State of West Virginia, and cannot be allowed to control the actions and decisions of

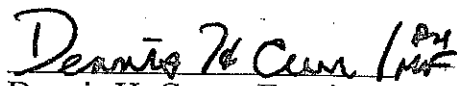
employers in this State. Because the lower court's order granting Summary Judgment to S.W. Jack Drilling Company is against the clear public policy of this State, the lower court's ruling must be overturned and this case remanded.

VIII
PRAYER FOR RELIEF

WHEREFORE, based upon the above stated, the Petitioner Prays this Court to overturn the lower court's entry of Summary Judgment in favor of S. W. Jack Drilling Company and remand this matter to the lower court to proceed to trial, along with all other and further relief this Honorable Court deems just and proper.

EVELYN L. "PEACH" MURPHY, as
Administratrix of the Estate of
ANDREW JOHN MURPHY, deceased,
By counsel


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EVELYN L. "PEACH" MURPHY,
Administratrix of the Estate of
Andrew John Murphy,

Appellant/Plaintiff Below,

v.

APPEAL NO.: 33811

S. W. JACK DRILLING COMPANY,

Appellee/ Defendant Below.

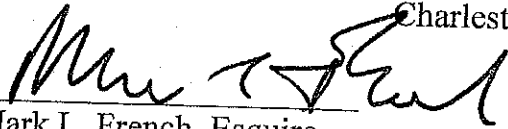
CERTIFICATE OF SERVICE

I, Mark L. French, Esquire, counsel for Appellant, Evelyn L. "Peach" Murphy, hereby certify that on this 4th day of February, 2008, I served a true copy of the foregoing "*Appellant's Brief*" upon counsel of record as indicated below by mailing a true copy thereof via the United States mail, in a postage paid envelope:

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IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

EVELYN "PEACH" MURPHY, as Administratrix of the Estate of
ANDREW JOHN MURPHY, deceased,

Plaintiff,

v.

CIVIL ACTION NO. 06-C-151
Honorable Eric H. O'Briant

EASTERN AMERICAN ENERGY
CORPORATION, a West Virginia corporation;
KENNETH GREATHOUSE, a West Virginia resident;
RODNEY PAXTON, a West Virginia resident;
DOROTHY LEWIS, a West Virginia resident;
DENNIS LEWIS, a West Virginia resident;
THE JACK COMPANY, a Pennsylvania corporation;
S.W. JACK DRILLING CO., a Pennsylvania corporation;

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On the 15th day of February, 2007, the matter of Defendants, S.W. Jack Drilling Co.'s, Rodney Paxton's and Kenneth Greathouse's Motion for Summary Judgment, brought pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, came before this Court. The Court has studied the Motion, plaintiff's Response, other pertinent legal authorities, and heard the oral arguments of both parties presented at the hearing on this day. After deliberation, for the reasons set forth in this opinion, the Court **GRANTS** the Motion for Summary Judgment.

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The Standard of Review

1. The Court first addresses the standard of review for motion for summary judgment. In West Virginia it is well established that "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point

3, *Aetna Casualty & Surety Survey Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined." Syllabus Point 5, *Aetna, Id.*

3. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syllabus Point 6, *Aetna, Id.*

4. "A motion by each of two parties for summary judgment does not constitute a determination that there is no genuine issue as to a material fact. When both parties move for summary judgment each party concedes only there is no issue of fact with respect to his particular motion." Syllabus Point 9, *Aetna, Id.*

5. "Summary Judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

6. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, (3) submit an Affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syllabus Point 3, *Williams v. Precision Coil, Inc.*, 184 W.Va. 52, 459 S.E.2d 329 (1995).

7. "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56 (c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syllabus Point 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

Findings of Fact and Conclusions of Law

1. Evelyn "Peach" Murphy has standing, as Administratrix of the Estate of Andrew John Murphy, to maintain the deliberate intent action pursuant to West Virginia Code §23-4-2(c). However, consistent with the statute and the decisions of *Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000) and *Savilla v. Speedway SuperAmerica, LLC*, No. 33053 (Nov. 15, 2006), Ms. Murphy only has standing to maintain the deliberate intent cause of action on behalf of the persons who have a cause of action under the statute: widow/widowers, children and dependents.

2. The case of *Savilla v. Speedway SuperAmerica, LLC* recently decided on November 15, 2006, is controlling case law. The Court is advised and aware that a Petition for Rehearing on the decision was denied in January.

3. Under *Savilla*, the persons who can recover in a deliberate intent action are a limited class: the spouse, child or dependent may take in the case of a wrongful death action. *See also W.Va. Code §23-4-2(c)*

4. In *Savilla*, the West Virginia Supreme Court identified that a deliberate intent action is a statutory cause of action. This Court believes that the Legislature considered the issue

of beneficiaries and the limitations on who could recover under this statutory cause of action, and acknowledges that the Legislature could have expanded the parties who could recover in such an action if it so desired.

5. The limited class of beneficiaries in a deliberate intent action is one of the obvious tradeoffs for the Workers' Compensation system that the Legislature has enacted.

6. The Court does not find any violation of public policy in the limitation of beneficiaries by the Legislature, and further finds that the limitation of beneficiaries does not violate the Equal Protection clauses of the West Virginia or United States Constitutions. The statute rationally and lawfully narrows the class of recipients entitled to take under a deliberate intent action consistently with the persons who benefit under the Workers' Compensation scheme.

7. The plaintiff has failed to show the lack of a rational basis for the limitation of beneficiaries under the deliberate intent statute. *See, e.g. Marcus v. Holley*, 217 W.Va. 508, 618 S.E.2d 517 (2005).

8. The Court does not adopt plaintiff's argument to expand the list of beneficiaries to those who could recover under the wrongful death statute, West Virginia Code §55-7-6.

9. The plaintiff argues that Ms. Murphy is indeed a "dependent" under West Virginia Code §23-4-2(c) and, therefore, entitled to maintain a cause of action. For the reasons stated below the Court disagrees.

10. This Court finds that Ms. Murphy made a claim for dependents' benefits on March 16, 2006. The Court finds that the claim went to the Office of Claims Management and that a decision was communicated to Ms. Murphy in August, 2006 that she was determined not to be a dependent.

11. The denial letter sent to Ms. Murphy directly informs her of the right to protest the decision to the Office of Judges, and that this right, if exercised, would have resulted in further evidentiary hearings, cross-examinations, etc. The Court finds that if Ms. Murphy had received an adverse decision before the Office of Judges, she could have appealed the matter to the Board of Review (pursuant to West Virginia Code §23-5-10), and any adverse decision by the Board of Review could have been appealed to the West Virginia Supreme Court of Appeals (pursuant to West Virginia Code §23-5-15).

12. It is undisputed that Ms. Murphy did not protest the decision by the Office of Claims and, therefore, there is no record or appeal further on the issue.

13. The lack of an appeal by Ms. Murphy makes the decision by the Workers' Compensation Division final and not subject to collateral attack. *See W.Va. Code §23-5-1* ("Unless an objection is filed within the thirty-day period, the finding or action is final. This time limitation is a condition of the right to litigate and hence jurisdictional."). *See also Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998).

14. The Court finds there exists no other evidence in the record before it of other persons who could take under West Virginia Code §23-4-2(c). Although the prospect of a heretofore unknown child of Mr. Murphy has been raised, there is no evidence in this record of any child of Andrew John Murphy. It is uncontested that he is not married. As such, there are no persons before this Court who could recover deliberate intent damages under the statute and pursuant to the *Savilla* decision.

15. As there are no persons who can take under West Virginia Code §23-4-2(c) and pursuant to the recent *Savilla* decision, S.W. Jack Drilling Co. is entitled to summary judgment, and the plaintiff's claims for deliberate intent damages are dismissed from this action. The

named supervisors for S.W. Jack Drilling Company, Rodney Paxton and Kenneth Greathouse, are likewise entitled to dismissal of this action against them for these same reasons.

16. The Court makes no findings as to whether an infant child or other heir for Mr. Murphy does in fact exist.

17. S.W. Jack Drilling Company will remain as a defendant to Eastern American Energy Corporation's cross-claim in this action. Mr. Paxton and Mr. Greathouse are completely dismissed and their names are to be removed from the style of this case.

The objections and exceptions of counsel for the plaintiff are noted.

It is so ORDERED this 21st day of March, 2007.

ENTERED:

Eric H. O'Brient

Eric H. O'Brient, Chief Judge

PRESENTED BY:

Nathaniel K. Tawney
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